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**SHALL THE LEGAL PRESUMPTION OF INNOCENCE BE
REGARDED, BY THE JURY, AS EVIDENCE?**

Certain standard works on the law of evidence are at variance in one material particular which may result in the change of a long and well-established rule, to the prejudice of the lives and liberties of the people.

Professor Greenleaf in his work on the Law of Evidence which has been a standard in this country for more than fifty years, vol. 1, § 34, among other things says:

"The legal presumption of innocence is to be regarded, by the jury, in every case, as a matter of evidence to the benefit of which the party is entitled."

There were not so many reported cases in the days of Greenleaf as at present, and those who wrote in his day were textbook lawyers, looking to the reason and custom for the rules of the law more than to decided cases, and it is reasonable to believe that much of the conflict and confusion now existing among the decisions of courts of last resort is due to the effort on the part of judges to follow decided cases where the facts do not always agree. Where statutes differ decisions must differ as a matter of course, but why should courts now differ so materially upon what the common law is?

Stricter adherence to the text of the law by courts would have tended to harmonize their decisions. It is fair to presume that the best text-writers have been among the most learned in the law, while binding decisions have come, in some instances, from those much less learned. It is impossible to harmonize the court decisions in this country even upon the common law, but when great text-writers differ on material questions there is cause for a pause and investigation.

Professor Wigmore in his work on the Law of Evidence, § 2511, among other things says:

"As to the second fallacy, it seems to have been mainly propagated by the passage of Professor Greenleaf, declaring that, 'This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled.'"

Then he says further, "but it cannot be regarded as matter of evidence." The Elliotts in their work on Evidence, § 95, substantially agree with Professor Wigmore.

Here is a plain joinder of issue of law.

Greenleaf.—"Presumption of innocence is to be regarded * * * as matter of evidence."

Wigmore.—"But it cannot be regarded as matter of evidence."

Upon the decision of this issue hangs the form of the court's instruction to the jury on the doctrine of presumption of innocence. To whom shall we go for a final and correct decision of this issue? And when may we look for it to be handed down? This decision must be made by the best legal minds and along the lines of the best legal thought and is not to be accomplished to the satisfaction of all in a day.

The doctrine laid down by Greenleaf is the result of the evolution of hundreds of years of experience and is part of the education of most lawyers of this time, and will not be easily overthrown. It appears from a note in Wigmore, to § 2511, that the disputation about this doctrine, as promulgated by Greenleaf, began with a lecture of Professor Thayer delivered at Yale University in the year 1896, in which he criticised the court's opinion in the case of *Coffin v. United States*, 156 U. S. 432.

In that case the Supreme Court of the United States, Mr. Justice White delivering the opinion, approvingly quoted Greenleaf, and followed the doctrine laid down by him, and by reasoning which seems faultless and unanswerable, and upon ample authority, sustains the doctrine that presumption of innocence is to be considered by the jury as evidence for the accused. It is apparent that this disputation began earlier than the lecture of Professor Thayer, but this is immaterial, and Wigmore, taking his cue from Thayer, criticises Greenleaf and the Supreme Court of the United States.

"Presumption applied to evidence, the object of which the discovery of truth, is the taking of a fact or proposition to be true, before it is positively shown or certainly known to be so." *Burrill on Cir. Ev.*, p. 9. See 3 Blackstone, p. 371.

It is not easy to say with certainty when any common-law rule was first established. Originally there were many kinds of trials,

many crude forms of accusations, public and private, and many tests of guilt and innocence.

"Criminal trials, as we know them, are the results of a long series of changes which occurred between the reign of Queen Mary, when the earliest trials of which we have detailed accounts took place, and down to our own time." Stephen's History Criminal Law of England.

But prior to the time of this Queen, there were trials of various kinds, and crude tests of innocence and guilt, the history of which is fragmentary, but enough can be gathered to serve the purpose here. It does not seem that the doctrine of presumption of innocence is of very ancient origin. It is apparent that the horror of convicting and punishing the innocent was in the line of the best and most humane legal thought, in the middle of the 17th century, and probably long prior to that.

Lord Hale was the first to declare, in the year 1678, that it is better that "*five*" guilty persons escape than that one innocent person should be convicted and punished. Less than one hundred years after that Sir William Blackstone finds the rule to be "*ten*" instead of "*five*," and later still, in 1824, Mr. Starke raises the number to "*ninety-nine*," which is taken to mean an indefinite number. These changes are doubtless the result of civilization. Far back of this in the law of Moses the accuser was admonished to be certain of his accusation before making it, but the dark ages doubtless effaced much of this principle from the human mind and it had to be learned again, by long experience; for this feeling has not at all times existed and its development in one mind does not establish that it had a wide range of public sentiment at that time.

The present humane rule of law which requires the court to direct the plea of not guilty for one who stands mute did not always exist. Not many centuries ago he who stood mute was adjudged guilty without further trial. Stephen's Hist. Crim. Law of Eng. VI, p. 45; Hawkins P. C., vol. 2, p. 460; Chitty Crim. Law, vol. 2, p. 425; 2 Sumner U. S. 67; 51 W. Va. 232.

A look backward into the morning twilight of civilization discovers no presumption of innocence but rather a presumption of guilt against the accused. Something of it remains yet, and is that feeling which causes one to pause and hesitate to enter freely into

companionship with one accused of a high crime. For all other purposes than that of trial presumption of guilt now obtains. In the effort to give bail the accused is presumed to be guilty. *Ency. Evid.*, vol. 9, p. 921.

After the Conquest, in England, till the time of Henry VII, trials might be by God and the Country, which meant by a jury of twelve men with an instruction from the Court, to "do what God shall put in your minds to the discharge of your consciences;" or it might be, at the election of the accused, by God alone, as in cases of fire and water ordeal, and others mentioned by Blackstone, book 4, page 341. See Stephen's *Hist. Crim. Law of Eng.*, vol. 1, p. 348.

These trials by ordeal were simply efforts on the part of the accused to cleanse himself of the accusation, relying on God to perform a miracle in his behalf. The presumption was against him as soon as he was accused. It meant his ruin, if he could not clear himself. The accusation was enough to put one to his purgation by his own denial in the presence of his friends who would swear that they believed him. Bouvier.

Trial by battle was simply an effort on the part of the accused to cleanse himself of the accusation by skill and physical force, evidently relying upon God to deliver him if he was innocent, or in the right, and after the battle between David and Goliath it seemed not a vain reliance. Another test, that of loosing to the two contending parties a vicious tiger, the first destroyed by it being loser, reminds us of the deliverance of Daniel from the lion's den. The mother of a bastard child who concealed its death must prove by one witness that the child was born dead. 4 Blackstone, p. 358. And therein lies another evidence of the presumption of guilt which then prevailed.

What conclusion may be safely drawn from the glimpses which have been hastily taken of the fragmentary history of legal trials? First, that there was a period of time when there was no presumption of innocence in favor of one charged with the commission of a crime; second, that during that period a charge or accusation was sufficient to raise the presumption of guilt from which the accused must purge himself; third, that if the accused stood mute he

was adjudged guilty without trial. "As a sheep before her shearers is dumb, so He openeth not his mouth." Is. 53:7; Acts 8:32; Matt. 27:12.

The rule of presumption of guilt had its change somewhere in the dim past, and perhaps in its place came the rule that required the accuser to prove his accusation. For a long time under this latter rule the accused was not allowed to call witnesses nor have counsel in his behalf.

In the year 1640 the defendant was first again permitted to call witnesses, but they were not allowed to be sworn. Later he was permitted to have his witnesses called and sworn on equal terms with the Crown. It seems reasonable that during the time that the accused was not allowed witnesses in his behalf that the presumption must have changed from guilt to innocence. The change took place as the ages passed, and the legal presumption of innocence is now quite as well established as any doctrine of the unwritten law, but this presumption, like evidence, is not conclusive. It may be repelled by evidence, like other evidence, and to convict, it is not enough to merely repel this presumption, but the evidence must amount to proof of guilt beyond all reasonable doubt.

The doctrine of reasonable doubt which was first embodied in an instruction in a high treason case in Dublin in the year 1798, seems to be of later origin than the doctrine of presumption of innocence which must have had its origin during the period of "no witness for the defense." If it be true, as it seems to be, that there was a time when the accused was presumed to be guilty, and had to make out, at the least, a *prima facie* case for himself, and that custom has so changed that rule that the accused is now, in all cases, presumed to be innocent, this presumption has simply taken the place of the evidence once required at the hands of the accused, and in the language of Greenleaf "this legal presumption of innocence is to be regarded * * * as evidence." This presumption takes the place of evidence, once required, and why should it not be considered by the jury as evidence?

It will be observed that Greenleaf does not say that *presumption* is evidence, but that this *presumption* is to be considered as evi-

dence, doubtless meaning that the presumption has taken the place of evidence once required.

It is therefore submitted that Greenleaf is right and that Thayer, Wigmore, and the Elliotts have made criticisms without sufficient foundation.

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*Richmond, Va.,
July 19, 1910.*